

SERVED: July 7, 1993

NTSB Order No. EA-3930

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 7th day of July, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11150
v.)	
)	
GERALD P. NYREN,)	
)	
Respondent.)	
)	

ORDER

This case is currently pending before the Board as a result of the Administrator's appeal from the initial decision of Administrative Law Judge Joyce Capps, issued orally at the conclusion of an evidentiary hearing held on November 29, 1990. By that decision, the law judge reversed the Administrator's order suspending respondent's airman certificate for 180 days for alleged violations of section 61.118 of the Federal Aviation Regulations ("FAR," 14 C.F.R.).¹

¹FAR § 61.118 provides in pertinent part as follows:

"§ 61.118 Private pilot privileges and limitations: Pilot in command.

Except as provided in paragraphs (a) through (d) of this section, a private pilot may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may he, for compensation or hire, act as pilot in

In brief, this case involves an argument over the availability of the "shared expense" exception as a defense to the claim that respondent, a private pilot at the time of the alleged offense, carried a passenger for compensation in violation of § 61.118. Section 61.118 lists the privileges and limitations associated with a private pilot certificate. As a general rule, private pilots may not carry passengers for compensation. However, a private pilot may agree to share expenses with passengers. The Administrator, in the course of this proceeding, has interpreted this shared expense exception as limited to agreements between pilots and their passengers, as opposed to arrangements in which the expenses of the passenger are compensated by a third party without the passenger having agreed to the arrangement. Such an interpretation apparently prohibits the arrangement under which respondent Nyren carried a passenger on several flights. Under Florida State regulations governing reimbursement for employees who provide their own transportation for travel required by the job, respondent Nyren was reimbursed for a portion of the expenses of several flights in his private aircraft. Mr. Nyren received additional reimbursement from the State for his carriage of another State employee who rode as his passenger. This reimbursement gave rise to the Administrator's order of suspension.

The appeal of this case to the Board raises issues under the recently enacted Civil Penalty Assessment Act.² These issues have not been addressed by the parties, as the appeal was taken prior to enactment. Because the Board must decide this case under the deference standards enacted in the 1992 legislation, it is advisable that additional briefing should be received before issuing a decision on the merits.

Under the terms of the new law, the National Transportation Safety Board is to be bound by interpretations of the Administrator where those interpretations are of regulations or laws entrusted to the Administrator's charge, where the interpretation is validly adopted, and where it is not arbitrary, capricious, or otherwise inconsistent with law.³ In the context of this appeal, the Board must decide whether an interpretation first offered in the context of enforcement litigation is validly adopted in the sense that it compels deference to the

(..continued)
command of an aircraft.

* * * * *

(b) A private pilot may share the operating expenses of a flight with his passengers."

² P.L. No. 102-345, the FAA Civil Penalty Administrative Assessment Act of 1992, signed into law on August 26, 1992.

³ P.L. No. 102-345, § 3, amending 49 U.S.C. App. § 1429(a).

Administrator's view.⁴

Because this case poses a clear-cut issue of first impression under the Civil Penalty Assessment Act, broad participation in its resolution would be welcome and advisable. Hence this order will be served upon all parties who participated in the Board's recent rulemaking regarding procedural rules for use in civil penalty proceedings. It will also be served on the Administrative Conference of the United States, as the assistance of the Conference will be most helpful, given that the enactment of the FAA Civil Penalty Assessment Act of 1992 relied heavily on the formal study undertaken by the Conference at the request of Congress.

Persons seeking amicus status need not file accompanying motions for leave to file, as the briefs are sought at the invitation of the Board. Commentary from amicus filers should be limited to the statutory construction issues exclusively. At the close of the briefing period, the Board may determine to schedule oral argument. Persons interested in participating if argument is held should so indicate.

Persons seeking copies of the initial decision and additional information on the underlying proceeding may contact Lisa Taylor or David Bass at 202-382-6540.

This order is issued under the authority delegated to me at 49 C.F.R. 805 24(b).

ACCORDINGLY, IT IS ORDERED THAT:

The parties are hereby granted 40 days from the date of service of this order to file supplemental briefs to the Board. Any person seeking amicus participation limited to statutory construction issues may file briefs in accordance with the schedule above.

Daniel D. Campbell
General Counsel

⁴ There is very little offered in the record regarding the Administrator's interpretative decision to preclude third-party reimbursement to a private pilot. It appears to have been developed at trial through the testimony of an expert witness based on his assessment of the logic and intent of the original rule. No precedent or useful reference to the enactment of the original rule is made.